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DEC 20 2004

No. 04-629

IN THE
Supreme Court of The United States

PETE K. RAHN, DIRECTOR OF THE MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THOMAS ROBB, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001) 6

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) 8

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 8

Knights of the Ku Klux Klan v. Arkansas State Highway & Transportation Dept., 807 F. Supp. 1427 (W.D. Ark. 1992) 6

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 8

Planned Parenthood of South Carolina Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), *cert. petition filed* 9/24/04, No. 04-429 5

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004) .. 6

Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) 8

Terminiello v. Chicago, 337 U.S. 1 (1949) 8

Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995) 6, 9

Wells v. City and County of Denver, 257 F.3d 1132 (10th Cir. 2001) 7

OTHER AUTHORITIES

Fed. R. Civ. P. 56(c) 3

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Respondents (collectively the "Ku Klux Klan" or "KKK") attempt to diminish the importance of the "government speech" issue with somewhat overlapping arguments set out in three sections. But the KKK's arguments are unavailing. First, the KKK inaccurately characterizes the lower court opinions as based on findings of fact when the trial court actually decided the case as a matter of law on a summary judgment motion. Second, the KKK suggests that there is no conflict in the circuits by focusing

only on Adopt-A-Highway cases and asserting that they all have found the speech to be that of the participant. But the only cases to so hold are from the Eighth Circuit itself; the Fifth Circuit case the KKK cites for that proposition merely assumed, rather than found, that the participant was the speaker. And the non-Adopt-A-Highway cases are highly relevant because they demonstrate the critical circuit conflict on the recurring issue of whether the first question in a government speech case is, "Whose speech is it?" Third, the KKK argues that public safety and reactions to speech cannot be considered based on "no heckler's veto" cases, but the public forum cases that the KKK cites as authority are irrelevant; no public forum is involved here.

Nothing in the Brief in Opposition takes away from the fact that the Eighth Circuit has eliminated an essential, initial part of government speech analysis. Nor does anything in the Brief in Opposition take away from the fact that the government speech issue in general and its application to Adopt-A-Highway programs specifically is of great importance. And it is important not just to Missouri and to the eleven states and territories from every region of the country that have filed an *amicus curiae* brief asking this Court to grant Missouri's petition, nor even to the other states that thank volunteer cleanup crews with official signs. By its silence, the KKK confirms that the questions posed by this case also arise in myriad other circumstances in which the government is speaking about private persons or causes.

1. The KKK's primary argument against the granting of the petition for certiorari is that the trial court made a "fact-based determination" (Brief in Opp., Section

1, at 3). The Klan's premise is incorrect. The trial court entered judgment for the KKK on a motion for summary judgment, which can only be granted when "there is no genuine issue of material fact" and the movant "is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Had the trial court entered summary judgment based on factual determinations, the Eighth Circuit likely would have reversed the judgment for violating Rule 56. But the trial court did not decide this case based on factual findings. Where the parties differed, and where the Petitioners differ with the courts below, is on questions of law.

The KKK suggests that the lower courts made a fact-based determination that the State of Missouri's actions were not "unbiased" and were a "smokescreen" (Brief in Opp. 3-4). The Eighth Circuit suggested that there was something sinister about denying participation to Unit 188 of the KKK, apparently because no court had found that members of Unit 188 had lynched anyone (Petition for Certiorari, App. A-36-39).

But the point of Missouri's petition for certiorari is that the State does not have to be unbiased when the State engages in government speech.[1] The Eighth Circuit's legal error was in asserting that courts do not have to address the question, "Whose speech is it?" (Petition for Certiorari 13-14). Omitting that step when addressing a government's

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[1] Although there were viewpoint-neutral reasons for Missouri to refuse to allow the KKK to participate in the program (Petition for Certiorari 22-26), such reasons are not necessary under the proper application of the government speech doctrine.

claim that the speech is government speech is contrary to the views of the Ninth and Tenth Circuits and of some judges on a divided Fourth Circuit (Petition for Certiorari 17-22). Those courts confirm that governments can choose which citizens or groups to honor or not honor. Just as a state can choose to induct into a "Hall of Fame" its finest businesspeople, athletes, or judges while not erecting plaques to successful drug-dealers or racists, the government can choose not to erect a sign giving praise or recognition to racist organizations like the KKK. By skipping the question, "Whose speech is it?," the Eighth Circuit significantly inhibits government speech.

The KKK also suggests that the Eighth Circuit did not bypass the "speaker" question, *i.e.*, that the appellate court made a *factual* finding that the State is not the speaker on the signs it creates, installs, and maintains because there is not enough of a governmental message being conveyed (Brief in Opp. 5). Even if appellate courts could make factual determinations, the dispute here is one of law: does the law require the State to place its official imprimatur on literally any group that decides to participate, no matter how repulsive to the State and its citizens?

This litigation shows just how much speech is in the "thank you" sign that the Eighth Circuit concluded does not contain a message. The litigation has been so hard-fought for so many years *because* a "Thank you Ku Klux Klan" sign is so expressive that it would be inflammatory. Missouri does not want to send the message that it has anything good to say about a despicable, terrorist-like organization. Conversely, the Klan has fought so hard because it knows that a single State "thank you" sign sends a more

powerful message than dozens of KKK-erected billboards. How could the Eighth Circuit conclude that a highway sign is *not* the speech of those who make and erect it, but picking up trash *is* speech of those who do the work. Federal courts should not force state governments to suggest that they support the Klan in any way – even if the public benefits in some way from a particular Klan activity.

Given the myriad forms of speech in which government has a role – and the controversy that may be reflected in such speech[2] – there is a pressing need for a principled, uniform view as to whether "whose speech is it?" is a question that must be answered at the beginning of the analysis. Unless this Court gives the analytical steps a uniform definition, governments in the Eighth Circuit will face suits that would be meritless elsewhere.[3]

2. To argue that there is no split in the circuits on the government speech issue, the KKK ignores the Eighth Circuit's analytical innovation and moves directly to the niche in which this case arose, asserting that all four courts

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[2] See, for example, *Planned Parenthood of South Carolina Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. petition filed* 9/24/04, No. 04-429 (Petition at 20-21) (vehicle license plates imprinted with the words, "Choose Life").

[3] Trying to minimize the scope and impact of the Eighth Circuit's holding, the KKK also argues that the resolution of the case "did not depend on whether the [Adopt-A-Highway] regulations were constitutional" (Brief in Opp. 3). But in fact, the Eighth Circuit "conclude[d] that the regulation is unconstitutional" (Petition for Certiorari, App. A-40).

that have addressed whether Adopt-A-Highway programs involving "thank you" signs constitute government speech have found that the participant, not the government, is the speaker (Brief in Opp. at 6). The KKK then cites this case,[4] the Eighth Circuit's previous KKK Adopt-A-Highway case from Missouri,[5] and a district court case from within the Eighth Circuit.[6]

The only case the KKK cites from elsewhere does *not* hold that the Adopt-A-Highway participant is the speaker. In *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995), the Fifth Circuit merely stated that it was "assuming" that the Klan's participation would constitute speech. The Fifth Circuit made this assumption because it held – directly contrary to the Eighth Circuit – that reactions to the Klan being identified on an Adopt-A-Highway sign justified its exclusion from the program (see pp. 7-9, *infra*).

Eighth Circuit courts stand alone in Adopt-A-Highway cases in holding that the speech was not that of the government. The fact that in the Eighth Circuit judges have been consistent in refusing to apply a government-

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[4] *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004).

[5] *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001).

[6] *Knights of the Ku Klux Klan v. Arkansas State Highway & Transportation Dept.*, 807 F. Supp. 1427 (W.D. Ark. 1992).

speech analysis to Adopt-A-Highway programs only reinforces the need for action by this Court.

To justify its refusal to consider cases that involve other forms of what governments claim to be government speech, the KKK argues that the cases cited in the petition for certiorari are not analogous to Adopt-A-Highway cases because in the cases described in the petition "the government has collected funds to promote their own policies" (Brief in Opp. 6). Here, the government has collected volunteers committing time (rather than funds) to promote the government's own policies (clean highways). But the government's recruitment of money rather than time is of no constitutional significance. Put in terms of *Wells v. City and County of Denver*, 257 F.3d 1132, 1137 (10th Cir. 2001), whether the "sponsors that help maintain the lights at the City and County building" do so through monetary contributions or by personally replacing burned-out bulbs doesn't affect the question of who speaks when the government says, "thank you."

The real distinction today is not between money and volunteers, it is between governments speaking in the Eighth Circuit and those speaking elsewhere. This Court should resolve the split in the circuits on the proper application of the government speech doctrine.

3. The Ku Klux Klan does not dispute that a KKK Adopt-A-Highway sign would threaten public safety. Instead the KKK argues that the government cannot consider reactions to speech, even dangerous reactions, because the first amendment does not allow a "heckler's veto." In the petition, we pointed out that the "no heckler's

veto" proposition does not apply to nonpublic fora such as Missouri's Adopt-A-Highway program (Petition for Certiorari 22-23). The KKK's Brief in Opposition does not address the public-forum versus nonpublic-forum distinction. None of the five cases cited by the KKK are nonpublic forum cases (*see* Brief in Opp. 4).[7]

Finally, the Klan attempts to offer one distinction from the Texas Adopt-A-Highway case. The KKK asserts that the Fifth Circuit "found" that the KKK was attempting to use the Adopt-A-Highway program to intimidate a desegregated housing project (Brief in Opp. 4-5). In fact, the Fifth Circuit stated that intimidation would be an *effect* of the Klan's participation, but the KKK asserted that it merely wanted to engage in speech. *Texas v. Knights of the Ku Klux Klan*, 58 F.3d at 1078, n.1.

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[7] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992) (ordinance imposing variable permit fees for demonstrations in a public forum was facially overbroad; no nonpublic forum analysis); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (first amendment does not allow libel suits for damages for emotional distress; no nonpublic forum analysis); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (reversing conviction of Jehovah's witnesses for residential soliciting without a license; conviction cannot stand based on mere unpopularity of message with "established" churches; no nonpublic forum analysis and no contention of dangerous reactions); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (convictions based on leafleting without a license reversed; no discussion of reaction to speech or nonpublic fora); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (criminal conviction for breach of peace based on merely inviting dispute cannot be sustained; no nonpublic forum analysis).

Regardless, the Fifth Circuit allowed Texas to consider reactions to a Ku Klux Klan Adopt-A-Highway sign, and the Eighth Circuit bars Missouri from doing the same. The conflict is direct and irreconcilable. This Court should reconcile the conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

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December 20, 2004